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No. 88-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW ORLEANS PUBLIC SERVICE INC.,
Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, *ET AL.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE COUNCIL OF THE CITY OF NEW ORLEANS, *ET AL.*, IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Whether, under the abstention doctrines of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Younger v. Harris*, 401 U.S. 37 (1971), and this Court's mandate in *Pennzoil Co. v. Texaco Inc.*, 107 S. Ct. 1519 (1987), the United States Court of Appeals for the Fifth Circuit properly affirmed a federal district court's exercise of its discretion to abstain from reviewing the retail level order of a state regulator, where: (a) the district court found that there was no facial conflict between the state regulator's order and the federal regulator's wholesale level determinations; (b) the state courts have been adjudged fully competent to review both state and federal issues, including those arising under the Federal Power Act; (c) review of the retail level order is underway in the state court system; (d) the state court review encompasses issues of state as well as federal law; (e) state court review is consistent with the procedural model followed in the recent *Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349 (1986), and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S. Ct. 2428 (1988) cases; and (f) the identical issues were presented to this Court in a prior case between the parties where *certiorari* was denied?

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OPINIONS BELOW

The opinion of the Court of Appeals has now been reported at 850 F.2d 1069.

STATEMENT OF THE CASE

A. Introduction

This case marks the third time in as many years that New Orleans Public Service Inc. ("NOPSI") has sought to obstruct state court review of a state regulatory matter of extreme local concern. In each instance, NOPSI has been directed by the federal courts to bring its challenge to state level regulatory orders

of the Council of the City of New Orleans ("Council") in the state judicial system.[1]

This petition represents NOPSI's second attempt to persuade this Court that it must mend an apparent rift in the circuits on the issue of whether abstention by the federal courts can be appropriate in the face of a preemption claim—a divergence of views which is neither as developed nor as intolerable as NOPSI alleges. Analysis of the alleged conflict between the circuits reveals simply a case-by-case effort to determine whether abstention is appropriate in light of such factors as the status of the state proceeding, the extent to which the state action has or is likely to conflict with federal regulation, and the form of abstention at issue.

This Court denied NOPSI's previous petition which presented essentially the same issues (*see* 107 S. Ct. 1910 (1987)),[2] and no different result is warranted

[1] NOPSI's two prior actions include: *New Orleans Public Service Inc. v. City of New Orleans*, Civ. Action No. 85-3398 (E.D.La. dismissed Dec. 16, 1985), *rev'd*, 782 F.2d 1236 (5th Cir. 1986), *modified and withdrawn in part*, 798 F.2d 858 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1910 (1987) (hereinafter, "*NOPSI I*"); *Middle South Energy, Inc. and New Orleans Public Service Inc. v. Council of the City of New Orleans*, Civ. Action No. 85-5273 (E.D.La. dismissed Dec. 19, 1986), *aff'd*, 833 F.2d 583 (5th Cir. 1987) (hereinafter, "*NOPSI II*").

[2] NOPSI suggests in its petition (at 5, 9) that the Court's denial of its previous petition was due to a ripeness problem. In the *NOPSI I* case, the Council argued that NOPSI's underlying claim of preemption was not ripe since at the time the action was commenced, the Council had not completed its rate proceeding. The issue as to whether or not the federal courts should have abstained was not alleged to be untimely. It is noteworthy that both NOPSI and the Solicitor General took the

here.[3] NOPSI presents no new authority in support of this petition, and, in fact, this Court's position on abstention has been re-emphasized since the denial of *certiorari* in *NOPSI I*. *See Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519 (1987).

Since 1985, NOPSI has sought to suppress the exercise of retail regulatory oversight by the Council which has, under Louisiana law, plenary authority to regulate the retail electric rates charged by NOPSI to ratepayers in New Orleans. In this case, NOPSI asks the federal courts to enjoin implementation of the Council's "Prudence Investigation: Determinations and Order Regarding the Prudence of the Management of New Orleans Public Service Inc. With Respect to Grand Gulf I" (hereinafter, "Rate Order"). NOPSI has sought the identical relief from the state judicial system, and proceedings are underway there regarding both the merits of the Rate Order and NOPSI's claim that the order is subject to federal preemption. This case thus presents the classic setting for application of this Court's recent instruction that "[s]o long as those challenges [in federal court] relate to pending state proceedings, proper respect for the ability of state courts to resolve federal questions presented in state court litigation *mandates* that the fed-

position that the case was ripe for review despite "procedural problems." As in *NOPSI I*, preemption is not the issue before this Court; rather, the issue is which judicial system, state or federal, should hear in the first instance NOPSI's claim that the Council's regulatory action has been preempted.

[3] Indeed, in a recent letter to the Chief Deputy Clerk, NOPSI anticipated (inaccurately) that respondents might seek an extension of time to answer the petition. Petitioner stated that no additional time should be needed because the issues are the same as those briefed in *NOPSI I*.

eral court stay its hand." *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1527 (1987) (emphasis added).

B. Factual Background

In 1985, the Federal Energy Regulatory Commission ("FERC"), in the exercise of its jurisdiction over the sale of wholesale power in interstate commerce, issued an order affixing the allocation of costs for the Grand Gulf I nuclear project among the operating subsidiaries of Middle South Utilities, Inc. ("MSU"). That order *reduced* NOPSI's share to 17 percent from the 29.8 percent NOPSI had volunteered to take in 1980, on the ground that the larger share was unjust and unreasonable. *See Middle South Energy, Inc.*, 31 FERC ¶ 61305 (1985), *aff'd*, 32 FERC ¶ 61425 (1985).

The FERC order set the rates to be paid at wholesale by the MSU operating subsidiaries to System Energy Resources, Inc. ("SERI"), another MSU subsidiary which owns the plant. The FERC order did not address how, whether, or to what extent the Grand Gulf wholesale costs should be borne by retail ratepayers. Significantly, NOPSI did not participate in the Grand Gulf proceeding until after the close of the hearings and evidentiary record, and its retail level responsibilities to the New Orleans ratepayers was never at issue in the proceeding. The Council participated, although it did not have regulatory authority over NOPSI at that time.[4]

[4] In 1981, regulatory control over NOPSI was transferred from the Council to the Louisiana Public Service Commission ("LPSC"). On May 4, 1985, pursuant to a public referendum, the electorate of New Orleans voted to reinvest the Council with the power of supervision, regulation and control over NOPSI. The FERC Grand Gulf proceedings took place during the period

Although NOPSI had become involved in the Grand Gulf project in 1974, when it and the other MSU operating companies agreed to guarantee the indebtedness of SERI for the plant, the Council did not learn of the extent of NOPSI's involvement and the potential impact of the project until 1980. By this time, NOPSI had already committed to take a 29.8 percent share of the plant despite the fact that NOPSI represented only 9 percent of the system load. At a public hearing on September 17, 1980, NOPSI attempted to portray Grand Gulf as a great benefit to ratepayers. When the Council questioned NOPSI as to the propriety of having made such a large commitment without the knowledge or approval of the state regulator, the company's president, James M. Cain, testified, under oath, that New Orleans would *not* have to pay for Grand Gulf should the Council deem it inappropriate and that NOPSI instead would sell its power to other utilities. Mr. Cain assured the Council that:

> If it is in the wisdom of this Council that it is not appropriate for New Orleans Public

the LPSC held this regulatory authority. The LPSC, which also regulates NOPSI's sister company Louisiana Power & Light Co. ("LP&L"), advanced a position before the FERC under which LP&L, the largest company on the system (with approximately 44 percent of the total system load), would be responsible for only 14 percent of Grand Gulf costs, while NOPSI (with only 9 percent of system load) would be responsible for 17 percent of the plant. When it became evident that the LPSC was not fully protecting New Orleans' interests, the Council intervened separately in the FERC proceedings, and recommended that NOPSI receive no more than a 9 percent allocation. The LPSC's position with regard to the shares to be borne by LP&L and NOPSI ultimately was adopted by the FERC.

> Service to participate in this agreement, which they will reflect on through either approval or disapproval of the capacity adjustment clause, through the approval or disapproval of any rate relief we seek as per Grand Gulf, *then NOPSI has the option of selling the capacity and marketing it which, we think, will be a very attractive commodity to other electric utilities who will view this as very, cheap, reliable power for the future.*

In the Matter of NOPSI Rate Hearing—Public Hearing on Electric and/or Gas Rates, Transcript of Proceedings, September 17, 1980 at 547 (emphasis added).

Subsequent to the FERC's allocation order, NOPSI filed an application with the Council to increase its retail rates to recover the costs associated with its Grand Gulf purchase. The increase sought was of approximatelv $160 million per year, a 60 to 70 percent increase. The Council received uncontroverted expert testimony that such a massive rate increase would have subjected the New Orleans community to severe "rate shock", with a threatened loss of thousands of jobs and resulting poverty for many New Orleans residents. The Council initiated a retail rate proceeding to determine issues that must be considered by the retail regulator such as phase-in plans, other forms of rate moderation, allocation of the increase among the utility's classes of customers, and the prudence of the company's exercise of its retail level obligations, including compliance with its franchise with the City.

In March 1986, the Council and NOPSI reached a settlement of NOPSI's application of a rate increase which provided for NOPSI's absorption of $51.2 million of Grand Gulf costs and for a phase-in plan to moderate the adverse effects of rate shock on New Orleans ratepayers. The settlement expressly provided that the Council could continue its inquiry into the prudence of NOPSI's retail level management decisions relating to Grand Gulf. In the resolution initiating the inquiry, No. R-85-636 (October 1985), the Council established the parameters of the inquiry and stated, explicitly, that it would "not seek to invalidate any of the agreements surrounding Grand Gulf I or to order NOPSI to pay [SERI] a rate other than that approved by the FERC."

The prudence inquiry was conducted during 1986 and 1987. On February 4, 1988, the Council issued its 224 page Rate Order, which contains a rigorous analysis of NOPSI's involvement in Grand Gulf. The Rate Order requires a one time disallowance and write-off by NOPSI of a sum equal to $135 million in NOPSI's deferred Grand Gulf I expenses and a reduction in planned rate increases which commenced April 9, 1988 to reflect the disallowance. The Council found that, in general, NOPSI's oversight and review of its Grand Gulf obligation was uncritical and severely deficient. NOPSI's management remained ignorant of important information and significant events that affected its Grand Gulf commitment, and instead was caught up in an effort to portray Grand Gulf as a great benefit to ratepayers.

The disallowance, however, was not based on NOPSI's purchase of Grand Gulf power, but instead was based on the company's failure, in the critical 1979-80 time period, to pursue an available alternative for reducing risks—reselling a portion of its Grand Gulf power to an off-system buyer, and substituting

coal-fired capacity to satisfy NOPSI's future needs.[5] Such a step would have provided much needed diversification of power supply and would have reduced NOPSI's own exposure to the risk (ultimately realized) that Grand Gulf would turn out to be an extraordinarily high cost plant. NOPSI's failure to resell was egregious, in particular, because the company's president had provided public assurances in 1980, in response to pointed questions by its retail level regulator, that NOPSI could resell such power and that the New Orleans ratepayers would not have to pay for Grand Gulf if the Council so ordered.[6] Despite the disallowance, the Rate Order fully accepted the FERC's 17 percent allocation to NOPSI and the Council fashioned a remedy consistent with the company's obligation to pay expenses associated with that allocation.[7]

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[5] By way of analogy, what the Council's order found to be deficient is not NOPSI's decision to commit to, *e.g.*, a lease for office space, but rather its failure to take steps to sublet a portion of that space (in the case of Grand Gulf, through off-system sales) once it became apparent that the office space leased was excessively priced or uneconomic for other reasons.

[6] NOPSI states that it could not have sold power off-system in advance of the final regulatory decision. (Pet. at 6). In fact, the decision is not yet final and it is not at all unusual for utilities to enter into contracts with escape clauses to deal with the impact of regulatory orders.

[7] NOPSI alleges that the $135 million disallowance equates to the 9 percent allocation urged by the Council in the FERC proceeding, and thereby conflicts with the FERC's 17 percent allocation to NOPSI. (Pet. at 6). The prudence disallowance does not equate to a reduction of the FERC allocation to 9 percent. The expert witnesses testifying in the prudence hearing believed that NOPSI should have sold *all* its Grand Gulf share off-system. The Council, however, was willing to impose a *limitation* on that remedy, by assuming that NOPSI at least would have retained a 9 percent share, a portion relative to NOPSI's size in the MSU system. The remaining portion of its 17 percent share also was not written off. The Council allowed that portion to be passed through at the level of coal-fired power. Moreover, yet a further limitation was imposed on the prudence remedy by the Council's concern that NOPSI's solvency be maintained. The Council restricted the disallowance to $135 million to ensure that NOPSI could continue to meet its obligation to SERI and the remainder of the MSU system for the 17 percent allocation. The $135 million disallowance is considerably less than the $476 million disallowance that would have resulted if the Council had merely "reduced" NOPSI's share to 9 percent.

C. Prior Litigation

The history of the litigation between the Council and NOPSI over NOPSI's 1985 request for a rate increase has been torturous. When the Council first initiated its proceeding regarding NOPSI's request for a $160 million per year increase, the company sued the Council in federal district court seeking, *inter alia*, $1 *billion* in damages from the members of the Council, individually and collectively.

The district court dismissed on abstention grounds, rejecting NOPSI's preemption claims, and the Fifth Circuit ultimately affirmed, finding both *Burford*[8] and *Younger*[9] abstention applicable. *See* 798 F.2d 858 (5th Cir. 1986). The Fifth Circuit instructed NOPSI that despite its allegations of federal preemption, abstention was appropriate since "the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise." 798 F.2d at 862. NOPSI then filed a petition for *certiorari* with this Court alleging, as it has here, that abstention is improper when a

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[8] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

[9] *Younger v. Harris*, 401 U.S. 37 (1971).

preemption claim has been presented and that this issue has "polarized" the Courts of Appeal. This Court denied NOPSI's petition. *See* 107 S. Ct. 1910 (1987).

NOPSI initiated its second action against the Council in October 1985 when the Council commenced its prudence inquiry. NOPSI sought to enjoin the inquiry again on the ground of alleged federal preemption. The district court dismissed on the basis of abstention and lack of ripeness. The appellate court affirmed the ripeness holding and did not reach the alternative abstention issue. *See* 833 F.2d 583 (5th Cir. 1987). NOPSI sought rehearing, which was denied on January 19, 1988. When the Council issued its Rate Order on February 4, 1988, NOPSI asked the Fifth Circuit to recall the mandate and to grant injunctive relief, once more asserting that the Council's actions were preempted by the FERC allocation. The court denied NOPSI's motion on March 3, 1988.

This action ("*NOPSI III*") was commenced several days after the Council's issuance of its Rate Order. NOPSI sought to enjoin implementation of the Rate Order, alleging federal preemption, impermissible collateral attack on the FERC orders, exclusive federal court jurisdiction, and interference with interstate commerce. The district court dismissed on abstention grounds, rejecting NOPSI's argument that the Council's actions were wholly preempted by the FERC's Grand Gulf allocation and additionally rejecting NOPSI's assertion of exclusive federal jurisdiction. The court found no facial conflict between the Council's Rate Order and the FERC Grand Gulf determinations:

> The Rate Order, on its face, sets only retail rates; it does not attempt to order that NOPSI pay SERI any amount different from that order by the FERC. Thus, there is no facial conflict with FERC Opinion No. 234. Furthermore, the division of federal and state authority in the Federal Power Act makes it clear that the government has not entirely preempted state regulation of retail sales of electricity.

App. 32A.

After losing in the district court and unsuccessfully seeking an injunction pending appeal, NOPSI asked the Fifth Circuit for a similar injunction, raising the same federal preemption issues it had asserted below. The court denied NOPSI's motion but granted the company's unopposed request for an expedited appeal. On July 28, 1988, the Fifth Circuit issued its opinion affirming the district court's decision to abstain.

Apparently heeding the district court's advice in *NOPSI III* that its "plea for relief should be litigated first in the state court forum" (App. 33A), NOPSI also filed suit for review of the Council's Rate Order in the Civil District Court for the Parish of Orleans. Two additional lawsuits were filed with regard to the Rate Order: one by the Council itself seeking to enforce the order and another by citizens' groups seeking a considerably higher disallowance due to NOPSI's imprudent management.

NOPSI's original complaint attacked the Rate Order on a number of state law grounds, *e.g.*, that the Council's Order is arbitrary, capricious and not supported by substantial evidence; that it applies an erroneous standard of prudence; that it breaches the March 1986 settlement agreement between NOPSI

and the Council; that the procedures used by the Council in conducting the prudence inquiry violated NOPSI's right to procedural due process under the Louisiana constitution; and that the prudence disallowance constitutes a taking without just compensation and a denial of substantive due process rights under the Louisiana constitution. NOPSI subsequently amended its complaint to raise the federal issues of preemption, collateral attack on the FERC decision, and interference with interstate commerce. The Council has asserted the affirmative defense of estoppel, an additional state law issue.

On April 15, 1988, NOPSI filed a motion in the state court proceeding seeking a preliminary injunction to bar implementation of the Council's Rate Order. NOPSI's motion was based *solely* on the federal issues contained in its amended complaint. The Civil District Court denied NOPSI's motion by an order entered on May 5, 1988, finding that "the actions taken by the City do not conflict, frustrate, or interfere, with the wholesale rate making authority of FERC and therefore, do not violate federal law."[10] The matter has been appealed to the Louisiana Court of Appeal for the Fourth Circuit and briefs have been filed.

Meanwhile, the three consolidated cases are being heard on the merits by the Civil District Court. Opening briefs, including a motion for summary judgment by the Council, were filed on August 8, 1988, and responsive pleadings were filed on September 20, 1988.

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[10] *New Orleans Public Service Inc. v. Council of the City of New Orleans*, No. 88-4511, Reasons for Judgment at 3 (C.D.C. Par. Orleans, May 5, 1988).

REASONS FOR DENYING THE PETITION

A. The Apparent Conflict Among The Circuits Presented By Petitioner Is Illusory: The Variance In Results Simply Reflects A Case-By-Case Analysis Rather Than Adherence To A "*Per Se*" Rule

NOPSI premises its request for review on an alleged direct conflict between the abstention holdings of the Fifth Circuit and those of other federal courts of appeal. In truth, there exists no hard and fast rule for or against abstention in the face of a preemption claim.[11] Rather, the lower courts have proceeded on a case-by-case basis, and have analyzed the propriety of abstention in light of such factors as the status of the state proceeding, the extent to which the state action has or is likely to conflict with the federal scheme, and the form of abstention alleged. If there is one point all the circuits that have considered the issue (including the Fifth Circuit) appear to agree upon, it is that they will not hesitate to exercise jurisdiction where the state and federal actions are in *direct* conflict and that conflict is readily discernible from the pleadings. Careful analysis of the cases presented by NOPSI in its petition reveals that there is no "conflict" which requires plenary review by this Court. The flexibility and effectiveness of the lower courts in addressing abstention on a case-by-case basis

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[11] During consideration of the *NOPSI I* petition for *certiorari*, the Solicitor General, writing as *amicus* on behalf of the United States and the FERC, agreed that "there is, of course, no *per se* rule against abstention in a federal preemption case; rather, the propriety of abstention depends on the nature of the particular preemption claim at issue." *See* "Brief for the United States and the Federal Energy Regulatory Commission As *Amici Curiae*", *American Electric Power Co. v. Kentucky Public Service Commission*, No. 86-49 (U.S. Sup. Ct., filed March 26, 1987).

and the absence of any need for further guidance from this Court are illustrated by examining not just the results reached by different circuits but also the different results reached by particular circuits in varying factual and legal contexts.

The Fourth Circuit's treatment of the propriety of abstaining in the face of a preemption claim exemplifies the issue. In *Aluminum Company of America v. Utilities Commission of the State of North Carolina*, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984), the court abstained under *Burford* from reviewing a state commission rate order which involved "important and basic considerations of state policy."[12] The court viewed the case as presenting "the quintessential setting of a complex state regulatory scheme concerning important matters of state policy for which impartial and fair administrative determination subject to expeditious and adequate judicial review are afforded." 713 F.2d at 1029.[13]

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[12] The state court's ensuing treatment of the preemption claims led to this Court's decision in *Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349 (1986). While ultimately disagreeing with the state court, this Court apparently found the state review process to be beneficial, and it complimented the state court for "an admirably thorough consideration of the myriad issues before it." 106 S. Ct. at 2354.

[13] The Sixth Circuit has, as well, upheld abstention despite allegations that a state public service commission was seeking to displace or ignore a FERC-approved rate agreement. *American Electric Power Co. v. Kentucky Public Service Commission*, No. 85-5129 (6th Cir. Mar. 24, 1986), *cert. denied*, 107 S. Ct. 1910 (1987). Although the court did not view *Burford* abstention as applicable, abstention under *Younger* was proper since a state court proceeding to review the state commission's action was underway.

Notably, the court declined to adopt a *per se* rule. Rather, it opined that a refusal to abstain would be required where the preemption claim is well-founded and the conflict is readily discernible from the pleadings, such as where the federal government has preempted the field or "where there is a *direct, facial* conflict between state and federal statutes." *Id.* at 1030 (emphasis added).

Subsequently, the Fourth Circuit upheld a lower court's refusal to abstain where the state commission, in reliance upon a West Virginia statute, created a "direct, facial conflict" with federal law by asserting authority to disapprove an interstate transmission agreement previously approved by the FERC. *Appalachian Power Co. v. Public Service Commission of West Virginia*, 614 F. Supp. 64 (S.D.W. Va. 1985), *aff'd*, 770 F.2d 159 (4th Cir. 1985). Critical to the district court's decision not to abstain was the fact that the state commission sought to decide the *identical* issues already decided by the FERC. 614 F. Supp. at 71; *see also Appalachian Power Co.*, 630 F. Supp. 656, 663 (S.D.W. Va. 1986), *aff'd*, 812 F.2d 898 (4th Cir. 1987).

The Fifth Circuit itself has refused to abstain from intervening in an on-going state administrative proceeding where the preemption claim was well-founded. In *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 744 F.2d 1107 (5th Cir. 1984), *vacated and remanded on other grounds*, 106 S. Ct. 1884 (1986), the Fifth Circuit found that regulatory action by the Louisiana Commission was "directly contrary" to an order issued by the Federal Communications Commission and that the case was "in no way dependent on local factors or local expertise

for [its] resolution." 744 F.2d at 1123. Under such circumstances, abstention was held to be improper.

The Third Circuit similarly has refused to apply a *per se* rule of abstention stating that it "would, admittedly, be an overstatement to suggest that *Younger* abstention is never appropriate when the question presented is one of preemption." *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 791 F.2d 1111, 1117 (3d Cir. 1986). A key purpose of the abstention doctrine is to avoid federal interference in state proceedings which could develop particular state policies and solutions. In this case, the court declined to abstain where the state response and policy had already been fully articulated—in fact, by all three branches of the Pennsylvania government. Despite its decision that abstention was improper, the court reconciled its ruling with the Fourth Circuit's holding in *Aluminum Company of America*, noting that the case before it presented an issue of facial conflict between federal and state statutes. *Id.* at 1116 n.6.

A direct conflict between federal law and state action was plain on the face of pleadings in the Eighth Circuit's review of *Middle South Energy, Inc. v. Arkansas Public Service Commission*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986), a case relied upon by NOPSI (Pet. at 11). In *Middle South Energy*, the Arkansas commission had initiated a proceeding requiring the utility (a sister company to NOPSI) to "show cause why all contracts and agreements made by it with respect to . . . the Grand Gulf project should not be held void *ab initio* as a matter of law", 772 F.2d at 408, to the end that the utility might avoid paying *any* of the interstate costs as-

signed by the FERC. Since the contracts and agreements involved provided the basis for the FERC's decision, and because the Arkansas commission was trying to secure for Arkansas "the zero allocation" already rejected by the FERC (*id.* at 411), there was indisputable and complete preemption of the proposed state action—a situation wholly unlike that involved in the Council's Rate Order, which explicitly preserves the federal allocation and related agreements.[14] With this finding of preemption, the court did not see a reason to abstain. *Id.* at 417.[15]

The Ninth Circuit's view on the issue is similar to that of the other circuits that have considered the issue: where the fact of preemption is "readily apparent", abstention is unwarranted. *See Fresh International Corp. v. Agricultural Labor Relations Board*, 805 F.2d 1353, 1361 (9th Cir. 1986) (a case not cited by NOPSI). In that case, the court held in *favor* of abstention and distinguished its apparently contradictory holding in *Champion International Corp. v. Brown*, 731 F.2d 1406 (9th Cir. 1984) (a case relied

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[14] The distinction between the facts underlying this case and the actions of the Arkansas commission are stark. *See NOPSI I*, 798 F.2d at 863 n.1. It is remarkable that NOPSI nevertheless characterizes the result in the two cases as dependent upon "the fortuity of whether the supplicant and the courthouse are in Arkansas or Louisiana." (Pet. at 14).

[15] The Eighth Circuit echoed this view two years later in another Grand Gulf case, *Arkansas Power & Light Co. v. Missouri Public Service Commission*, 829 F.2d 1444 (8th Cir. 1987), noting that where a challenge to a state regulatory action is based on preemption, abstention is "*seldom* applicable." *Id.* at 1450 (emphasis added).

upon by NOPSI),[16] stating "[w]e did not say in *Champion* that abstention never is appropriate when a preemption claim is raised. . . . Rather, *Champion* was a case in which preemption was readily apparent. . . . In the case before us, preemption is not readily apparent." *Id.* at 1361. In *Champion*, the court had found that "Congress has shown clearly its interest in uniform regulation of pension plans and its intention to establish pension plan regulation as *exclusively* a 'federal concern' " (*id.* at 1408, emphasis added),[17] a situation that is unlike the divided jurisdiction embodied in the Federal Power Act.

Thus, the Courts of Appeal have almost uniformly shown sensitivity to the factual and legal context of the abstention cases before them. Where the courts

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[16] NOPSI also relies upon *International Brotherhood of Electric Workers v. Public Service Commission of Nevada*, 614 F.2d 206 (9th Cir. 1980), and *Knudsen Corp. v. Nevada State Dairy Commission*, 676 F.2d 374 (9th Cir. 1982). These cases also found that if a preemption claim is well-founded, abstention cannot be appropriate, since abstention would implicitly involve a ruling on the merits. *International Brotherhood*, 614 F.2d at 212 n.1; *Knudsen*, 676 F.2d at 377. Although the court's ruling is consistent with its explanation in *Fresh International* that the propriety of abstention is dependent on the vitality of the federal preemption claim, its logic appears to be flawed. If the propriety of abstention is based on whether or not the preemption claim is well-founded, the court's decision *not* to abstain also would implicitly involve a ruling on the merits.

[17] *Baggett v. Department of Professional Regulation*, 717 F.2d 521 (11th Cir. 1983), is to a similar effect. The state attempted to regulate the pilotage of enrolled vessels, a matter subject to *exclusive* federal regulation. *Id.* at 523. The court noted that it would be "an overstatement to suggest that when the federal question is one of preemption, abstention under the principle of *Younger v. Harris* is never appropriate." *Id.* at 524.

have been convinced that a claim of federal preemption is well-founded, *i.e.*, where there is a direct, facial conflict between the state and federal action, abstention has been viewed as unwarranted. Resolution of the underlying preemption claims is, of necessity, fact dependent, and no *per se* rule can be fashioned to address the propriety of abstention in such circumstances.

B. The Fifth Circuit's Decision To Allow Abstention In Accordance With Its *NOPSI I* Opinion Was Proper

In affirming the district court's decision to abstain, the Fifth Circuit relied principally upon its holding in *NOPSI I* that abstention was warranted under both *Burford* and *Younger*. Critical to the court's holding in that case was the structure of the Federal Power Act, with its "bright line" between federal regulation of sales at wholesale to local distribution utilities and state regulation of the rates charged at retail to ultimate consumers. *See NOPSI I*, 798 F.2d at 860:

> The existence of this "bright line" colors the way we view a preemption claim involving the Federal Power Act. NOPSI has attempted to depict the situation before us as one in which the Council is stepping into the realm of *wholesale* rate making, a field under the exclusive jurisdiction of FERC. NOPSI focuses on the disruption of a *federal* scheme. Yet federal court intervention here may constitute a disruption of a *state* regulatory scheme, for *retail* rate making is clearly a field left to the jurisdiction of the states.

Id. The court thus held that

> Although we do not intimate that abstention in the face of a preemption claim under the Federal Power Act may never constitute an abuse of discretion, abstention should perhaps more often obtain in cases presenting a question of preemption under the Federal Power Act than would be so in cases presenting other types of federal preemption claims.

Id. at 861. In the decision below, the court found no reason to stray from this course. App. 17A-18A.

1. *Burford* Abstention Was Proper In Light Of The Availability Of State Court Review Of A Matter That Encompasses Issues Of Deep Local Concern

In both *NOPSI I* and the proceeding below, the Fifth Circuit applied *Burford* abstention. This doctrine is appropriate where there exists a comprehensive state regulatory scheme and where federal interference would disrupt efforts to develop a reasoned response to matters of legitimate local concern. The Council's Rate Order involves such concerns.[18] The order represents the Council's efforts to maintain oversight over NOPSI's obligations under its franchise to efficiently and economically manage and operate its properties and its responsibility to the ratepaying community to carry out prudent utility operations. NOPSI's obligation to the New Orleans' community is not altered by its membership in an interstate holding company arrangement. In the Rate Order, the Council undertook the complicated task of balancing

[18] *See NOPSI I*, district court slip op. at 14 and 798 F.2d at 862; *NOPSI II*, district court slip op. at 8-9 and 833 F.2d at 587; *NOPSI III*, App. 17A, 31A-33A.

its legitimate local interest—indeed, its obligation—to redress the company's blatant disregard of its retail level duties against NOPSI's responsibility under the FERC wholesale rate order. In the words of the Fifth Circuit, "the regulation and adjustment of local utility rates is of paramount local concern and a matter which demands local administrative expertise. The regulatory system is complex." App. 17A. *Burford* abstention thus is justified.

Burford abstention also depends on the availability of state court review of local regulatory actions. The competence of the Louisiana courts to address the merits of the Council's Rate Order and any federal claims asserted by NOPSI cannot be doubted. The Fifth Circuit found the local courts to be "fully able" to address such matters.[19] App. 17A. Moreover, abstention would not "foreclose [this Court] from entertaining NOPSI's preemption claims should it wind its way up through the state courts, as is demonstrated by the path of the recent *Nantahala* case." *Id.* at 18A. NOPSI apparently has acquiesced in this view. It has sought review of the Council's Rate Order in the state judicial system with respect to both the merits of the findings and its preemption claims. NOPSI's complaint and the Council's response thereto embrace significant state law issues as to which the state courts should be permitted to speak.

NOPSI asserts that state courts cannot have an overriding interest in adjudicating preemption claims,

[19] That the Louisiana courts are fully able to address federal preemption and indeed, have found preemption, is evidenced by such cases as *Thibodeaux v. Thibodeaux*, 454 So. 2d 813 (La. 1984), *cert. denied*, 469 U.S. 1114 (1985); and *State v. Jenkins*, 107 So. 2d 648 (La. 1958), *cert. denied*, 359 U.S. 998 (1959).

particularly under the Federal Power Act. (Pet. at 10.) The contrary is true. The Federal Power Act contains an express reservation of authority for the states; hence, regulation of utility matters is not an area in which Congress has intended the federal government fully to occupy the field. Additionally, this Court has held that the "filed rate doctrine", which provides that FERC-established wholesale rates are binding in judicial proceedings, is applicable to state court proceedings. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 581-82 (1981); *Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349, 2355 (1986). The state courts thus are able and obligated to address Federal Power Act issues placed before them. *Nantahala*, 106 S. Ct. at 2356-57.

2. *Younger* Abstention Was Proper In View Of The Ongoing State Judicial Proceeding

In both *NOPSI I* and the proceeding below, the Fifth Circuit also found abstention appropriate under the *Younger* doctrine. Indeed, *Younger* abstention may be more warranted now than at any previous stage of the controversy between the Council and NOPSI, since a state court lawsuit for review of the Council's Rate Order is underway.

Younger " 'espouse[s] a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances.' " *NOPSI I*, 798 F.2d at 863, *quoting Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 431 (1982). As held by the Fifth Circuit, "*Younger* would justify abstention because the Council proceedings constituted an ongoing state judicial proceeding, involving important state interests, and

in that proceeding NOPSI had an opportunity to litigate its federal claims." App. 18A.

In recent years, this Court has grown increasingly emphatic regarding the need to preserve the notion of comity through application of the *Younger* doctrine. Thus, in *Ohio Civil Rights Commission v. Dayton Christian Schools*, 106 S. Ct. 2718, 2728 (1986), the Court stressed that "the *normal* thing to do when federal courts are asked to enjoin pending state proceedings in state courts is not to issue such injunctions." Similarly, in *Pennzoil Co. v. Texaco, Inc.*, 107 S. Ct. 1519, 1527 (1987), the Court issued a "mandate" that when a challenge in federal court relates to pending state proceedings, "the federal court [must] stay its hand."

NOPSI argues that the Court has upheld the authority of federal courts to enjoin state utility actions on preemption grounds, without addressing whether abstention was required or permitted. (Pet. at 10). Two of these cases, *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943), and *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958), were decided long before the Court's abstention holdings, particularly as represented by the *Younger* doctrine, had reached the level of development evident today. The *United Fuel* case, nevertheless, reviewed abstention under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and found it distinguishable. 317 U.S. at 463. The decision repeats the Court's admonition that federal courts "should be wary of interrupting the proceedings of state administrative tribunals by use of the extraordinary writ of injunction." *Id.* at 468. However, the rule is "not to be applied in blind dis-

regard of fact" (*id.* at 469), and the facts before the Court revealed the state commission orders to be "plainly invalid." *Id.* In the third case cited by NOPSI, *Schneidewind v. ANR Pipeline Co.*, 108 S. Ct. 1145 (1988), there was no pending state action, administrative or judicial.[20] Plainly, these cases do not advance NOPSI's position that federal court abstention is unwarranted here.

C. There Is No Facial Conflict Between The Council's Retail Level Rate Order And The FERC's Wholesale Level Allocation Of Grand Gulf Costs That Would Warrant Federal Court Intrusion Into Ongoing State Proceedings

NOPSI alleges that the Council's Rate Order collaterally attacks and disregards the FERC's Grand Gulf allocation decision (Pet. at 10, 13), apparently seeking to bring itself under the rule noted above that abstention may not be warranted where there is a direct, facial conflict between federal and state action. No court to date has adopted NOPSI's view that the Council's effort to fashion an entirely retail level response to NOPSI's gross mismanagement assails the FERC's designation of 17 percent of the Grand Gulf costs to NOPSI. In each of three federal lawsuits it has brought against the Council, NOPSI has alleged such "complete" preemption of the Council's retail rate authority, and in each instance, it has been rejected on this point. *See* "Prior Litigation", *supra*. Additionally, the Louisiana trial court, which reviewed NOPSI's preemption claims on its motion for a preliminary injunction, found no such conflict. That decision now is before the state appellate court on its review of the denial of NOPSI's motion. NOPSI also has raised the issue anew before the Louisiana Civil District Court in its briefs on the merits of the Council's Rate Order. The decision of the Civil District Court will be subject to review by the higher Louisiana courts and, if necessary, by this Court. This is precisely the procedural path followed in the *Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349 (1986), and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 108 S. Ct. 2428 (1988) cases heralded by NOPSI.

In its attempt to profile this case as essentially a preemption (rather than abstention) matter, NOPSI has alleged that the facts are identical to those in the recent *Mississippi Power & Light* preemption ruling by this Court.[21] This represents a serious misportrayal of the facts of this case. While the *Mississippi Power & Light* case arose out of the Grand Gulf controversy and did involve a proposed prudence investigation, its similarity to the instant case ends with those facts. The differences, on the other hand, are significant:

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[20] *Public Utilities Commission of California* lacked the procedural complication of an ongoing judicial proceeding as well. There, the case had been filed by the United States before a three-judge district court.

[21] The state courts have not yet had the opportunity to rule on whether the *Mississippi Power & Light* decision addresses the issues considered by the Council in its Rate Order. (The Council submits that it does not.) The state courts should be allowed to rule on the issue in light of a fully developed factual record before federal review is warranted. *See Nantahala*, 106 S. Ct. at 2354.

The State of Mississippi—

(1) sought to adjudge the prudence of MP&L's decision to *participate* in the Grand Gulf project;

(2) sought to adjudge the prudence of the decision to *construct*, and continue construction of Grand Gulf I; and

(3) asserted authority, on the basis of such prudence determinations, to set rates based on an assumption that MP&L is obligated to *purchase less* Grand Gulf power than FERC has ordered it to purchase.

See, e.g., 108 S. Ct. at 2439, 2441.

In contrast, the Council in its Rate Order—

(1) disavowed authority to take any action based on NOPSI's decision to participate in Grand Gulf;

(2) disavowed authority to review the prudence of constructing or completing Grand Gulf I; and

(3) fully accepted NOPSI's FERC-determined allocation as a given, taking no steps that would prevent NOPSI from fully satisfying that obligation, and basing its imprudence disallowance solely on actions NOPSI failed to take at the retail level to mitigate the risks it confronted.

See NOPSI III, App. 30A, 32A-33A. The critical facts thus are reversed. The Council assumed that NOPSI would be obligated to take and pay for a share of Grand Gulf. It then asked whether management, facing such an obligation, properly could do absolutely nothing in the face of (1) deteriorating economic circumstances and (2) the management's own assurance to the state regulator that the ratepayers would not have to bear the costs of Grand Gulf and that NOPSI could sell power off-system if the Council so decided. The errors found fatal in the Mississippi court's ruling simply are not present here.

Moreover, the retail level issue of off-system sales—which lies at the heart of the Rate Order—is wholly absent from *Mississippi*. It is an issue that was not and could not have been the subject of the wholesale level allocation proceeding before the FERC. The FERC has no jurisdiction to examine a utility's choices in carrying out its retail level obligations. NOPSI, a regulated utility operating pursuant to a franchise with the City of New Orleans, should not be permitted to shield itself from the consequences of its retail level mismanagement merely by virtue of its participation in a multistate holding company arrangement.

CONCLUSION

WHEREFORE, for all the foregoing reasons, NOPSI's petition should be denied.

Respectfully submitted,

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